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No. 98-1970

In the Supreme Court of the United States

COMMERCIAL ENERGIES, INC., PETITIONER

v.

RICHARD DANZIG, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the Armed Services Board of Contract Appeals did not abuse its discretion in calculating the amount of a transportation rate adjustment due under a natural gas contract between petitioner and the Department of the Navy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not yet reported. The opinion of the Armed Services Board of Contract Appeals (Pet. App. 11a-27a) is reported at 98-1 B.C.A. (CCH) ¶ 29,549. An earlier opinion of the Armed Services Board of Contract Appeals is reported at 96-2 B.C.A. (CCH) ¶ 28,474.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1999. The petition for a writ of certiorari was filed on June 8, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 24, 1989, the Department of the Navy awarded petitioner a requirements contract to supply

natural gas for the Great Lakes Naval Training Center in Illinois through September 23, 1990. The gas was to be delivered to the "City Gate," the point of gas delivery from the interstate pipeline of the Natural Gas Pipeline Company of America (NGP) into the local distribution system of the North Shore Gas Company at Grayslake, Illinois. Pet. App. 2a, 12a.

Petitioner obtained the gas for the Naval Training Center from several vendors. Those vendors delivered gas from their repositories to NGP at various "insertion points" along its interstate pipeline. The gas was then transported along the NGP pipeline to the City Gate, where the gas was delivered into the North Shore Gas local distribution system. From there, the gas was delivered to the Naval Training Center. Pet. App. 18a-19a.

2. During the performance of the contract, disputes arose between petitioner and the Navy regarding, among other things, whether the Navy breached the contract during certain months when petitioner was unable to deliver the full amount of gas required by the Naval Training Center and whether petitioner was entitled to an adjustment in transportation rates under the contract. The Armed Services Board of Contract Appeals (the Board) conducted a bifurcated proceeding, the first phase of which concerned whether the Navy was liable to petitioner.

a. *The breach of contract issue.* The contract between petitioner and the Navy provided that the Naval Training Center was to obtain gas only from petitioner or North Shore Gas. The contract further provided that the Naval Training Center could obtain gas from North Shore Gas only in the event of an "interruption" or "curtailment" of the gas supplied by petitioner. Pet. App. 2a-3a, 13a.

In a separate contract, to which petitioner was not a party, the Navy and North Shore Gas established daily caps on the maximum amount of gas that could be delivered to the Naval Training Center through the North Shore Gas distribution system. Pet. App. 2a. In November 1989 and July 1990, petitioner was unable to deliver the full amount of gas ordered by the Naval Training Center because of those caps. *Id.* at 14a.

The Board determined that the Navy had breached the contract with petitioner during those months when, as a result of the delivery caps contained in the contract between the Navy and North Shore Gas, petitioner was unable to deliver the entire amount of gas requested by the Naval Training Center. *Commercial Energies, Inc.*, 96-2 B.C.A. (CCH) ¶ 28,474, at 142,208 (1996); see Pet. App. 3a, 16a.

b. *The transportation rates issue.* The price of the gas that petitioner provided to the Naval Training Center consisted of two components: the price of the gas itself plus the price of transporting the gas through NGP's interstate pipelines to the City Gate. The contract provided a fixed transportation price of $0.32521 per decatherm of gas. Pet. App. 4a, 12a.

The contract between petitioner and the Navy contained two provisions—Section C.4 and Section H.14—that together governed adjustments in the gas transportation price. Section C.4, titled "Development of Government Pricing Structure," provided, in pertinent part:

> (a) Offerors shall provide city gate prices for natural gas deliveries that reflect the sum of offeror's unit purchase price and the transportation unit price to the city gate. Total city gate prices shall remain fixed unless . . .

> First, the city gate prices will be adjusted, up or down, to reflect documented changes in transportation rates to the city gate, provided that such changes affect the actual cost of transportation to the city gate. The changes must be supported by tariff modifications authorized by the applicable Federal, state or local regulatory authority.

Pet. App. 17a-18a. Section H.14, titled "Transportation Price Adjustments," provided for an adjustment to the transportation prices specified in the contract if "the appropriate regulatory commission authorizes an increase or decrease in the tariff supporting the * * * transportation prices." *Id.* at 5a-6a.

The Federal Energy Regulatory Commission (FERC) sets tariff rates for the transportation of gas along interstate pipelines. The tariff rates reflect, among other things, the distance that gas must be transported. On September 15, 1989, after the Navy awarded the contract to petitioner, FERC approved revised tariff rates retroactive to January 1, 1989. On April 1, 1990, FERC approved further revised tariff rates retroactive for the period November 1989 to March 1990. Pet. App. 19a.

The Board determined that petitioner was "entitled to a transportation price adjustment for each month in which a documented NGP tariff revised by FERC increased or decreased [petitioner's] transportation costs." *Commercial Energies, Inc.*, 96-2 B.C.A. (CCH) at 142,208; see Pet. App. 2a-3a, 6a, 11a.

3. In the second phase of the bifurcated proceeding, the Board considered the amount of compensation, if any, to which petitioner is entitled. Pet. App. 11a-27a.

First, on the breach of contract issue, the Board concluded that petitioner's recovery, if any, would be

limited to its net lost profits in November 1989 and July 1990, the months during which the North Shore Gas delivery caps precluded petitioner from delivering the full amount of gas requested by the Naval Training Center.[1] The Board then concluded that petitioner had failed to prove the amount of any net lost profits and, accordingly, denied petitioner any recovery for breach of contract. Pet. App. 16a-17a.

Second, on the transportation price adjustment issue, the Board interpreted the contract, specifically Section C.4 and Section H.14, to authorize an adjustment only when petitioner's actual transportation costs were affected. The Board noted that the best evidence of such an effect would be a comparison between petitioner's actual transportation costs at the time of the contract award and petitioner's actual transportation costs after the tariff increases took effect. The Board determined, however, that the record did not contain such evidence. Accordingly, the Board, using figures stipulated between the parties, conducted a comparison based upon "theoretical" transportation costs at the time of the contract award and at the time of the deliveries. Using that method of calculation, the Board determined that petitioner is due a total price adjustment of $1145.79. Pet. App. 26a-27a.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-10a.

The court first upheld the Board's decision denying petitioner any recovery for the Navy's breach of con-

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[1] The Board rejected petitioner's claim that the Navy breached the contract in December 1989 by purchasing gas from People's Gas, Light and Coke Company, finding that the record contained no evidence of any such purchases by the Navy during the period in question. Pet. App. 14a-15a.

tract. The court concluded that the Board had not abused its discretion in limiting petitioner's recovery for the breach of contract to its net lost profits, because "[a]llowing [petitioner] to recover its gross profits would potentially overcompensate [petitioner] for any harm it suffered." Pet. App. 7a. The court, referring to "evidentiary deficiencies," then found that petitioner had "point[ed] to nothing in the record allowing the calculation of net profits." *Id.* at 8a.[2]

The court then upheld the Board's calculation of petitioner's transportation rate adjustment. The court rejected petitioner's argument that the Board should have calculated the transportation rate adjustment by comparing the transportation rate set forth in the contract with the revised FERC tariff rates. The court noted that the contract provided for an increase in the transportation rate only if an increase occurred in petitioner's actual costs of transporting gas. A comparison of the revised tariff rates to the contract price would not reveal whether petitioner's transportation costs increased, the court explained, because "[t]he contract price is the price paid by the Navy to [petitioner], not by [petitioner] to its suppliers." Pet. App. 9a.

The court recognized that petitioner had failed to provide the Board with what would have been the best evidence of the increase in petitioner's transportation costs—*i.e.*, "evidence of payments by [petitioner] to its

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[2] The court also upheld the Board's determination that the Navy had not breached the contract during December 1989. The court noted that petitioner had failed to identify any evidence that in December 1989, as in November 1989 and July 1990, the amount of gas that petitioner was able to deliver to the Naval Training Center was affected by the caps in the Navy's contract with North Shore Gas. Pet. App. 9a.

suppliers of amounts reflecting the differences between the original and amended transportation charges resulting from FERC's tariff revision"—and that the Board had therefore attempted to approximate the increase by comparing "the theoretical transportation rates at the time of contract award (based on the then-applicable FERC tariffs) with those at the time of delivery (based on the revised FERC tariffs)." Pet. App. 10a. The court concluded that the Board had not abused its discretion in using that methodology, which the court found "adequately capture[d] the effect of the tariff revisions on [petitioner]," and that the theoretical transportation rates used by the Board were supported by substantial evidence. *Ibid.*

ARGUMENT

The decision of the Federal Circuit is correct, does not conflict with any decision of this Court or any other court of appeals, and presents no question of recurring significance. The decision instead turns entirely on the particular facts of this case. This Court's review is therefore not warranted.

1. Petitioner principally challenges the methodology used by the Board, and held not to be an abuse of discretion by the court of appeals, to calculate the transportation price adjustment under the contract.

The contract between petitioner and the Navy provided for an increase in the transportation price "to reflect documented changes in transportation rates to the city gate, *provided that such changes affect the actual cost of transportation to the city gate*" and are "supported by tariff modifications authorized by the applicable Federal, State or local regulatory authority." Pet. App. 17a-18a (emphasis added). As the Board and the court of appeals recognized, in order to determine

whether petitioner was entitled to an increase in the transportation price that could be charged the Navy, and the amount of any such increase, the Board had to determine the extent to which petitioner's "actual cost" of transporting natural gas to the City Gate increased due to tariff increases after the contract award. Petitioner appears to dispute that construction of the contract. See, *e.g.*, Pet. 13 (suggesting that "[i]f the tariff rate went up or down, the Petitioner's recovery would be adjusted accordingly," apparently without regard to whether petitioner's actual costs had increased). But petitioner cites no contractual language to support its contrary construction.

Petitioner essentially concedes that it provided the Board with no "direct evidence, *i.e.*, proof of payment by Petitioner to its suppliers," (Pet. 10) to establish any actual increase in its transportation costs. See Pet. App. 25a (noting the absence of any direct evidence in the record of increases in petitioner's actual costs, such as the "documented payment by [petitioner] of amounts reflecting the differences between the original and amended transportation charges resulting from FERC's tariff revisions"). In such circumstances, the Board reasonably chose to approximate the increase in petitioner's costs, using "theoretical" transportation costs that reflected the tariff rates applicable at the time of the contract award and at the time of the gas deliveries. See *id.* at 26a-27a. The Board's methodology, unlike petitioner's, gave effect to the contract provision that petitioner would be permitted to charge the Navy more for transporting gas only if petitioner paid more to transport the gas due to a tariff revision. There is no reason to disturb the court of appeals' conclusion that the Board's methodology "adequately capture[d] the effect of the tariff revisions on [peti-

tioner]" and did not constitute an abuse of discretion in the circumstances of this case. *Id.* at 10a.

Petitioner argues (Pet. 10, 15) that its methodology, using as a basis the contract transportation rate of $0.32521 per decatherm, is "in accordance with industry standards" and should have been accepted by the Board. But the central question here is not which methodology was more consistent with industry standards. It is which methodology was consistent with the contract. Petitioner's methodology was not consistent with the requirements of the contract, which permitted petitioner to increase its transportation price only upon an actual increase in petitioner's transportation costs. As the court of appeals explained, a comparison of the contract transportation price with the revised tariff rates "bears no relationship to this purpose," because "[t]he contract price is the price paid by the Navy to [petitioner], not by [petitioner] to its suppliers." Pet. App. 9a. Using the contract price could "overcompensate[] [petitioner] for changes in the FERC tariffs," *ibid.*, because petitioner could recover even if its actual costs of transportation remained unchanged.

Petitioner repeatedly claims (Pet. 5, 9-10, 11-12) that the Board "changed the test" for determining the amount of any transportation price adjustment between its first and second decisions in this bifurcated proceeding. Petitioner asserts (Pet. 4) that the Board held in its first decision that "the amount of damages due for the transportation price adjustment for each month in which a FERC tariff revision occurred was to be measured by the documented tariff revision(s)." Petitioner misreads the Board's decision. In fact, the Board stated in its first decision that petitioner was "entitled to a transportation price adjustment for each month in which a documented NGP tariff revised by FERC

increased or decreased CEI's [*i.e.*, petitioner's] transportation costs." *Commercial Energies, Inc.*, 96-2 B.C.A. (CCH) at 142,208. The Board thus appears to have understood from the outset that petitioner could obtain an increase in the transportation price set forth in the contract only if petitioner established an increase in its transportation costs. Understandably, given that the Board was not concerned in that decision with the calculation of whatever transportation price adjustment might be due petitioner, the Board did not further elaborate upon how that calculation was to be made.

2. Petitioner also contends (Pet. 11) that the Board's methodology for determining the transportation price adjustment "is contrary to the filed rate doctrine." Petitioner did not raise any such contention before either the Board or the court of appeals. This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield*, v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam); accord *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). No exception to that rule is warranted here.

This Court has explained that "[t]he 'filed rate doctrine' prohibits a federally regulated seller of natural gas from charging rates higher [or lower] than those filed with the Federal Energy Regulatory Commission pursuant to the Natural Gas Act." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 573 (1981); see also *id.* at 577 (explaining that the filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority"). It is unclear whether petitioner is a "regulated seller of natural gas," and thus subject to the filed rate doctrine, as opposed to a mere conduit between suppliers and end users. Cf. Pet. 1 (stating that "[t]his Contract represented the

first time [the Navy] had ever purchased natural gas and transportation on an interstate pipeline other than directly from a regulated utility").[3] In any event, the contract in this case, as construed by the Board, gave effect to the filed rate doctrine by permitting petitioner to charge the government more for transporting gas in the event of a tariff increase, albeit only if the tariff increase actually affected petitioner's costs of transporting the gas.

3. In the body of the petition (Pet. 17, 18), although not in the question presented, petitioner contends that it was entitled to an award of damages for the Navy's breach of contract during November 1989 and July 1990. That claim, even if properly presented, is wholly fact-bound. See Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

The appropriate measure of damages for breach of contract is the amount necessary "to put the injured party in as good a position as that in which he would have been put *by full performance of the contract.*" *Northern Helex Co.* v. *United States*, 524 F.2d 707, 713 (Ct. Cl. 1975) (citing Restatement of Contracts § 329 cmt. a (1932)) (emphasis added), cert. denied, 429 U.S.

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[3] Petitioner's own successful bid on the contract at issue, which was not identical to the applicable tariffs in effect at the time, suggests that petitioner did not then consider itself subject to the filed rate doctrine. See *Commercial Energies, Inc.*, 96-2 B.C.A. (CCH) at 142,206 (observing that petitioner's "proposed $.32521/decatherm transportation price for [the contract] was based on NGP receipt point A[-]6 and delivery point A-20 (the 'City Gate')," whereas "the authorized tariffs from NGP receipt point A-6 to delivery point A-20 were $.4286/decatherm for November through March and $.3182/decatherm for April through October, with a 6.54% loss factor").

806 (1976). Petitioner was not entitled to receive anything more than the net profits that it would have received absent a breach. As the court of appeals recognized, "[a]llowing [petitioner] to recover its gross profits would potentially overcompensate [petitioner] for any harm it suffered." Pet. App. 7a.

The Board recognized that, in order to determine petitioner's net profits, all of the costs that petitioner would have incurred in obtaining and delivering the additional gas requested by the Navy in November 1989 and July 1990 would have to be subtracted from the gross revenue that petitioner would have received from selling that additional gas to the Navy. Pet. App. 17a.[4] During the hearing before the Board, petitioner's president acknowledged, in general terms, that petitioner incurred a variety of costs in providing gas to the Navy, including "management" costs "and a whole bunch of other things." *Id.* at 15a. But petitioner failed to adduce the proof necessary to quantify those costs. *Id.* at 15a-16a. The Board thus concluded that "one cannot determine from this record the amount of profit, measured by the difference between the gas price in

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[4] Petitioner argues (Pet. 8) that the "proper test" for determining lost profits was "to determine the volume of gas purchased during the month in issue and then multiply the volume by the difference between the cost and contract price." The Board and the court of appeals correctly rejected that methodology, which essentially would have allowed petitioner to recover its gross profits. Indeed, the court of appeals noted that it could not justify petitioner's claim based upon petitioner's own cost information. It observed, for example, that petitioner had asserted a profit of $0.52521 per decatherm for July 1990 even though the difference between its contract price and the purchase price for natural gas that it could not deliver due to the cap was only $0.20 per decatherm. Pet. App. 7a-8a n.2.

[the contract] and all costs [petitioner] incurred to perform and deliver such gas to [the Navy], which [petitioner] lost in the months of November 1989 and July 1990." *Id.* at 16a. Based upon that failure of proof, the Board declined to make an award of damages to petitioner for breach of contract (*id.* at 17a), a decision that the court of appeals held was not an abuse of discretion (*id.* at 7a). Petitioner has offered no persuasive reason for concluding otherwise.

Petitioner contends (Pet. 9) that the decision to deny any award of lost profit damages is inconsistent with *Freeman General, Inc.* v. *United States*, No. 90-1025, 1990 WL 165558 (Fed. Cir. Oct. 31, 1990) (noted at 918 F.2d 188 (Table)). An asserted conflict between two unpublished decisions of the same court of appeals is not a matter that merits this Court's attention. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Nor does any conflict actually exist. In *Freeman General*, although the contractor was unable to document its increased costs of performing the required work due to unanticipated site conditions, the record contained evidence that the government had estimated the claim for the extra work at $78,383. The court of appeals held that the Board "erred in refusing to consider this evidence." 1990 WL 165558, at *1. The record in this case contained no similar evidence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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